

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-5025

To be argued by
MICHAEL J. SALTZER

UNITED STATES COURT OF APPEALS
For The Second Circuit

In the Matter of
SEAFARER FIBER GLASS YACHTS, INC.,
Debtor-Appellant,

THE STATE OF NEW YORK, DEPARTMENT OF TAXATION
AND FINANCE, SALES TAX BUREAU,

Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEBTOR-APPELLANT
SEAFARER FIBER GLASS YACHTS, INC.

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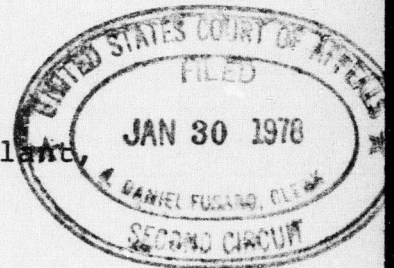


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THE STATE OF NEW YORK, DEPARTMENT
OF TAXATION AND FINANCE, SALES
TAX BUREAU

Claimant-Appellee

-----X

REPLY BRIEF OF DEBTOR-APPELLANT
SEAFARER FIBER GLASS YACHTS, INC.

Preliminary Statement

This brief is submitted on behalf of debtor-appellant, Seafarer Fiber Glass Yachts, Inc. ("Seafarer"), in reply to the brief, submitted in these proceedings, on behalf of claimant-appellee, The State of New York, Department of Taxation and Finance, Sales Tax Bureau ("Claimant").

Argument

THE VESSELS SOLD BY SEAFARER
ARE "MOTOR VEHICLES" WITHIN
THE MEANING OF SECTION 1117
OF THE NEW YORK STATE TAX LAW

- (a) The Applicable Statutory Provisions Show That Seafarer's Vessels Are "Motor Vehicles" Within The Meaning Of Section 1117 Of The New York State Tax Law

Seafarer contends that its vessels are "motor

vehicles" within the meaning of Section 1117 of the New York State Tax Law (the "Tax Law") and that sales of such vessels are thus exempt from retail sales tax pursuant to the provisions of subdivision (a) of Section 1117 of the Tax Law. In arguing that such vessels are not "motor vehicles" within the meaning of the statute, it is claimed on behalf of the Claimant, on page 9 of its brief, that the definition of "public highway", in Section 134 of the New York Vehicle and Traffic Law (the "Vehicle and Traffic Law"), is inconsistent with Seafarer's contention.

The term "motor vehicle" is defined for purposes of Section 1117 of the Tax Law by reference to the definition of that term in Section 125 of the Vehicle and Traffic Law.^{1/} It is the position of Seafarer, on this appeal, that, in so defining the term "motor vehicle" by reference solely to Section 125 of the Vehicle and Traffic Law,^{2/} the Legislature did not intend that a party, attempting to determine whether this important section of the Tax Law applied to his business, would have to refer to still other sections of the Vehicle and Traffic Law. Seafarer contends that the definition of "motor vehicle"

^{1/} Tax Law Section 1117(c).

^{2/} The inclusion within the definition of "motor vehicle," in Section 1117(c) of the Tax Law, of trailers, as defined in Section 156 of the Vehicle and Traffic Law, would appear to have no relevance to the matters in issue on this appeal.

in Section 125 of the Vehicle and Traffic Law is clear on its face and includes vessels of the type sold by Seafarer. If the Legislature had intended that other sections of the Vehicle and Traffic Law should be referred to in defining "motor vehicle" for the purposes of Section 1117 of the Tax Law, it would have made that intent clear by language in the statute. But it did not do so and the Court should not, in effect, retroactively amend the terms of the statute by reading such a provision into it.

However, assuming, for the purposes of discussion only, that the Court may read other sections of the Vehicle and Traffic Law in order to define the term "motor vehicle", as used in Section 1117(a) of the Tax Law, Seafarer's position is still valid. The definition of "public highway", in Section 134 of the Vehicle and Traffic Law, cited by the Claimant, and the definition of "highway", in Section 118 of the statute, the definitions most relevant to a further interpretation of Section 125, are in no way inconsistent with the position taken by Seafarer.

As indicated by Claimant, the definition of "public highway", in Section 134 of the Vehicle and Traffic Law is:

Any highway, road, street, avenue, alley, public place, public driveway or any other public way.

The definition of "highway" in Section 118 of the Vehicle and Traffic Law is as follows:

The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular traffic.

A waterway, such as Long Island Sound or a navigable river or bay, surely fits both of these definitions. With respect to the definition of the term "highway", it is common knowledge that navigable waterways and channels are marked by buoys maintained by public agencies, such as the Coast Guard. The channels themselves are also dredged and maintained by public agencies, such as the Corps of Army Engineers. The width of the waterway between buoys is certainly open to the use of the public for travel and since, as noted in Seafarer's main brief at pages 9 and 10, it has been established that vessels of the kind sold by Seafarer are vehicles, traffic on such waterway is "vehicular."

The definition of the term "public highway" appears to be even broader than that of "highway" since it includes the term "highway" together with other definitional terms. If a navigable waterway is a "highway" within the meaning of Section 118 of the Vehicle and Traffic Law, it must then, a fortiori, be a "public highway" within the meaning of Section 134 of the Vehicle and Traffic Law. In addition, a navigable waterway

could also come within the definition of "public highway" by virtue of it being a "public place" or "public way."^{3/}

In a footnote at the bottom of page 7 of Claimant's brief, by an analysis of subdivisions (a)(14) and (a)(18) of Section 1115 of the Tax Law, another attempt is made to show that the Legislature did not consider boats to be "motor vehicles" within the meaning of Section 125 of the Vehicle and Traffic Law. Claimant, in substance, argues that since subdivision (a)(18), in an enumeration of items not subject to a certain exemption, refers to both "boats" and "motor vehicles"^{4/} the Legislature did not consider boats to be "motor vehicles."

This is basically the same argument made by Judge Pratt in the paragraph numbered 8 of his decision (76a) and discussed in footnote 6 of Seafarer's main brief.

^{3/} It should be noted that the term "way", used in both Sections 118 and 134 of the Vehicle and Traffic Law, also appears in the common definition of the term "highway" in Webster's Third New International Dictionary (Seafarer's main brief, page 10).

^{4/} The sentence in question reads, "This exemption shall not apply to the sale of boats, snowmobiles or motor vehicles within the exemption of paragraph fourteen of subdivision (a) of this section."

This argument overlooks the fact that not all boats are "motor vehicles" within the meaning of Section 125 of the Vehicle and Traffic Law. As pointed out in the main brief, rowboats, canoes, pedal boats and any other type of vessels propelled by muscular power are not "motor vehicles" as defined by Section 125. Accordingly, the Legislature was required to use both the word "boats" and the words "motor vehicles" in this sentence and this use of the word "boats", in conjunction with the words "motor vehicles" fails to sustain Claimant's conclusion that, "...the Legislature never considered boats to be motor vehicles."

(b) The Cases Cited By Claimant Are Inapposite

Claimant's position herein is not supported by the cases it cites. A careful reading of Matter of Burns, 155 N.Y. 23, 49 N.E. 246 (1898), indicates that the case, instead of supporting Claimant's argument that a waterway is not a public highway, actually holds that a legislative act which declared a brook to be a public highway was valid.

In arriving at this determination, the Court of Appeals had to decide the question "whether a private or local act declaring a waterway or stream open for use to the public is fairly comprehended within the constitutional prohibition against passing such acts laying out

or opening highways?" (id. at 28).

The discussion by the Court of Appeals referred to by Claimant at page 8 of its brief represents the Court's analysis of the intent of the framers of Section 18, Article 3 of the Constitution when they prohibited the Legislature from passing a private or local bill "laying out opening...or discontinuing roads, highways or alleys." Only in that very limited context did the court find that framers of the constitutional provisions in question did not have a public waterway in mind when they used the words "roads" and "alleys."

Thus, the ultimate holding of the Court of Appeals in the Burns case sustains Seafarer's position that a waterway is a "public highway", since the court affirmed the validity of the legislative act declaring a brook to be a public highway, and this decision clearly refutes Claimant's contention that a waterway is not a "public highway."

McBoyle v. United States, 283 U.S. 25, 75 L.Ed. 816 (1931) and Di Giulio v. Rice, 70 P.2d 717 (Appellate Department, Superior Court, County of San Francisco, California, 1937), (improperly cited by Claimant as "Diquilio") the cases cited by the Claimant in which aircraft were determined not to be "motor vehicles" within the meaning

of certain statutory definitions, are inapplicable.^{5/} It would not be argued that an airplane is a motor vehicle within the meaning of Section 125 of the Vehicle and Traffic Law. This is not because they do not run on roads but because they are not operated "upon" anything. They are operated within a particular medium, namely, the atmosphere. Therefore, they clearly do not fit the definition of Section 125. Moreover, a definition of the air space within which airplanes operate would not be compatible within the definitions of "highway" or "public highway" in Sections 118 and 134 of the Vehicle and Traffic Law.

Hatteras Yacht Company v. High, 265 N.C. 653, 144 S.E.2d 821 (1965) appears, upon a cursory reading, to be factually similar to the instant case. A closer analysis, however, reveals two very significant distinctions which are not referred to by the Claimant.^{6/} First,

^{5/} In Munch & Romeo, Inc. v. Caton, 1 CCH Aviation Cases 644 (County Court, Nassau County, New York, 1936) the parties conceded that the provisions of the Vehicle and Traffic Law pertaining to an owner's liability in a collision were inapplicable. The court never discussed the question of definitions of "public highway" or "motor vehicles."

^{6/} Of course, this is a decision of a North Carolina State Court and, in any event, is not binding upon this Court.

in another section of the North Carolina Sales and Use Tax Act, which is the Act being interpreted in the case, there is a provision which specifically exempts certain sales of "boats" from the sales tax. The "boats" so exempted are boats sold to commercial fishermen and, thus, would be boats of the same nature as those in question in this case in that they would necessarily have engines and be self-propelled. Thus the North Carolina Legislature evidenced its intent to distinguish between motor vehicles and engine driven boats. The New York Legislature has never evidenced such an intent.

A second distinction between the Hatteras case and the case at bar is that a bill had actually been introduced into the North Carolina Legislature which would have specifically included boats among the items enumerated in the proviso in question. The bill was not enacted but the fact of its introduction and rejection are, again, indicative of a legislative intent in North Carolina to treat motor boats and motor vehicles separately. There is no such legislative history relating to Section 1117 of the Tax Law and Section 125 of the Vehicle and Traffic Law.

On page 8 of Claimant's brief, it is argued that People ex rel. Hudson and Manhattan Railroad Co., 203 N.Y. 119, 96 N.E. 435 (1911) supports Claimant's contention

that the definition of the term "highway" should be limited to a public way on land. A quotation from that case is included in the brief. Claimant has apparently overlooked the fact that the Hudson and Manhattan case was clearly distinguished by the Court of Appeal in People ex rel. New York Central Railroad Company v. State Tax Commission, 239 N.Y. 183, 146 N.E. 197 (1924). The New York Central case, cited at page 12 of Seafarer's main brief, held, at the urging of the State Tax Commission, that the crossing of a navigable portion of the Hudson River by the railroad's bridge constituted a special franchise to cross a public way or highway subject to taxation. See also, People ex rel. Lehigh Valley Railroad Company v. State Tax Commission, 220 App. Div. 1, 220 N.Y. Supp. 467 (3rd Dept., 1927), aff'd 247 N.Y. 9, 159 N.E. 703 (1928). The court, in New York Central limited the application of the Hudson and Manhattan case to cases involving tunnels constructed underneath the soil of a river where there was no interference with or restriction of navigable waters. The court apparently gave no weight to the language from the Hudson and Manhattan decision quoted by Claimant in its brief.

(c) The Application Of The Sales Tax
To Seafarer's Vessels Would Result
In Inequality Of Treatment And Undue
Hardship^{7/}

^{7/} On the final page of the brief, submitted on behalf of the Claimant, it is alleged that Seafarer's argument

On the final page of its brief, Claimant argues that there is a basic distinction between automobiles and Seafarer's vessels and that a difference in tax treatment between the two is, therefore, justified. The basis of the distinction, according to the Claimant, is that the vessels, "...are for the most part luxury and recreational items." This distinction does not withstand scrutiny. There are probably as many automobiles and automobile type vehicles which should be classified as luxury items as there are boats which would fall into the same classification. Very expensive automobiles, such as Rolls Royces, sports cars and, in many instances, a family's second car is no more than a luxury for the people involved. As to "recreational items", many vehicles built today, which Claimant would certainly concede are motor vehicles, are built solely as recreational vehicles and are designated as such. Campers, vans and even motorcycles fall into this category. The very distinction

based on the Equal Protection Clause of the Fourteenth Amendment is "...nowhere pleaded or raised below...." This is totally inaccurate. In paragraph 6 of Seafarer's petition in support of its motion to expunge, the grounds of Seafarer's objections to Claimant's claim are set forth. Such grounds include an allegation that the Tax Law, as applied by Claimant was "...inequitable, unfair, unjust, discriminatory and unconstitutional." (19a) In addition, the applicability of the Equal Protection Clause was argued at length on pages 13 through 16 of Seafarer's post hearing memorandum submitted to Judge Rudin. Seafarer's equal protection argument was also referred to on page 8 of its brief submitted to Judge Pratt on Claimant's appeal from Judge Rudin's decision.

between luxury items and necessary items, relied upon by the Claimant, exists among the items which Claimant would concede would be "motor vehicles" within the meaning of the exemption set forth in Section 1117(a) of the Tax Law.

It is not the differences between self-propelled vehicles which run on the land and engine driven boats which are operated on the navigable waterways which are significant. Rather, it is the similarities between the two kinds of vehicles which are meaningful in the context of the inquiry which must be made on this appeal.

In Seafarer's main brief, it is emphasized that both types of vehicles are relatively high-priced and would not be salable to out-of-state residents if the seller was required to collect sales tax at the point of sale. The exemption provided in Section 1117(a) of the Tax Law was obviously drafted in order to give New York motor vehicle dealers, particularly in areas bordering sister states, an opportunity to compete for the business of individuals residing outside of the State of New York and the benefits derived from that section are as applicable to boat dealers as they are to automobile dealers. Thus it was argued that since the rationale for granting the exemption applied to both automobiles and boats, it would result in unfair and unequal tax treatment to grant the exemption in the case of one type of vehicle and not in the case of the other.

Of course, both automobiles and boats could be delivered to the out-of-state buyer beyond the borders of the State of New York, thus avoiding the payment of the New York State sales tax. However, because of the physical characteristics of both boats and automobiles, such delivery would have to be made either by truck or other bulk carrier or the item in question would have to be driven or operated under its own power to a point beyond the borders of the State of New York. In the first case, delivery by carrier, the cost of such delivery would have to be taken into consideration and might be equal to or greater than the sales tax sought to be avoided. In the second case, delivery under the vehicle's own power, not only would there be costs involved but there would also be a problem in providing proof of such delivery which would be satisfactory to Claimant.^{8/}

The delivery cost factor and the problem concerning proof of out-of-state delivery are common to both boats and automobiles. On the other hand, to use the example set forth by Claimant, in the case of a diamond ring (or any other easily transported high-priced commodity)

^{8/} In this respect, it may be noted that this case arose, in part, because of the problems with which Seafarer has been faced in proving to Claimant that its vessels were delivered beyond the State of New York.

delivery, for a non-resident buyer, to a point outside of New York can be accomplished by insured mail or parcel post and clearly does not present the same problems.

These considerations further obliterate any meaningful distinction between Seafarer's vessels and other motor vehicles and serve to more clearly illustrate that the Claimant's position, that the exemption from sales tax should apply to cars but not to boats, is violative of the equal treatment mandated by the Fourteenth Amendment.

CONCLUSION

The decision of the District Court holding that Seafarer's vessels are not motor vehicles within the meaning of Section 1117(a) of the Tax Law should be reversed and the decision of Bankruptcy Judge Rudin sustaining Seafarer's objections to Claimant's claim for additional sales taxes should be reinstated.

Dated: New York, New York
January 27, 1978

Respectfully submitted,

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Service of two copies of the within
Reply Brief is hereby admitted this
30th day of January, 1978

Attorney for Appellee

COPY OF WITHIN PAPER
RECEIVED
DEPARTMENT OF LAW

JAN 30 1978

NEW YORK CITY OFFICE

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JB